THE HON'BLE SRI JUSTICE GODA RAGHURAM

WRIT PETITION NO. 4942 OF 2006

21-09-2006

Between:

The Food Corporation of India Godown Hamali
And Labour Contract Cooperative Society Ltd.,
Rep. by its President P.Venkataram,
C/o Railway Goods Shed, Nizamabad.

... Petitioner

And :

Food Corporation of India,
HACA Bhawan, Saifabad, Hyderabad,
Rep. by its General Manager (Region) and others

... Respondents

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ORAL ORDER :

Heard Mr. G.Vidyasagar, the learned counsel for the petitioner and Mr. V.Anjaneyulu, learned counsel for the 1st and 2nd respondents. No representation on behalf of the 3rd respondent.

The petitioner-Society seeks a declaration that the action of the Food Corporation of India ('the Corporation') in extending the validity of the tender beyond 22.11.2005 is unsustainable; that the 3rd respondent has no technical qualification for participating in the tender and that

consequently a declaration be issued that the 3rd respondent's technical bid be rejected including his price bid, offered pursuant to the tender notification dated 30.08.2005 and eventually for a declaration to the respondents 1 and 2 to continue the handling and transporting contract with the petitioner-society.

The last of the reliefs sought viz., a direction to the respondent-Corporation to continue the handling and transporting contract with the petitioner-Society cannot, in any event, be granted as that would amount to issuance of Mandamus to the 1st respondent to enter into a contract with the petitioner-society eclipsing the available administrative discretion which in concomitant with the power of the 1st respondent to enter into contracts.

The petitioner-society claims to be having handling and transport contractual relationship with the respondent-Corporation in respect of its godown at Nizamabad, at Dichpalli. The 1st respondent by a tender notification dated 30.08.2005 invited sealed tenders for grant of loading, unloading/handling and transport contract at FCI Godowns, Dichpalli, Nizamabad and Rail Heads at Nizamabad under a two bid system i.e., Technical Bid and Price Bid. The last date for receipt of tenders was 22.09.2005 and the tenders were scheduled to be opened on the same date. Clause 'C' of the specifications in the tender document was to the effect that the tender shall remain open for acceptance up to and inclusive of 22.10.2005. A note to Clause-C empowered the Senior Regional Manager, Hyderabad, at his discretion to extend the last date for acceptance by 30 days, and

specified that such extension shall be binding on each tenderer.

On the admitted factual scenario, no bid was accepted by 22.10.2005. On 19.11.2005 a telegram was issued to all the bidders who responded (including the petitioner and the 3rd respondent) requesting to consent for keeping the tenders open up to 31.12.2005 and to communicate such consent to the stipulated authority. Also admitted is the fact that the petitioner and the 3rd respondent conveyed their consent for keeping their respective bids open up to 31.12.2005.

While so, by a letter dated 16.12.2005 the petitioner, a handling and transport contractor whose tenure of contract had expired, was granted a three months extension from 18.12.2005 to 17.03.2006 at the pre-existing rates and terms. On 16.01.2006 the petitioner sent up a representation that its services be continued and that it should be called for negotiations. This representation also requested the respondents 1 and 2 to eschew the notified tender process and refund the EMD to bidders. Admittedly, no further extension was granted to the petitioner for handling and transporting works. The petitioner sent up another representation on 06.03.2006 reiterating the earlier request.

On 07.03.2006 the Regional Officer of the respondent-Corporation refunded the EMD of Rs.1,86,995/- (deposited by the petitioner along with its bid) by a Demand Draft dated 07.03.2006. The petitioner received the same on 10.03.2006. The petitioner states to have assumed that its

request was accepted and the earlier tender notification given up.

The petitioner states (in para-9) that it learnt that the 1st respondent had issued a telegram to the 3rd respondent calling upon the said respondent to remit the security deposit by 18.02.2006, in default the 3rd respondent's EMD would be forfeited. There was correspondence allegedly between the 3rd respondent and the other respondents thereafter too.

Alleging that the 3rd respondent was not qualified for award of the contract and asserting that for this reason the 3rd respondent's price bid ought to have been rejected even though it is the lowest; further that the 2nd and 3rd lowest tenders are not financially viable and experienced as per the tender notification; claiming that the petitioner-Society is the only eligible tenderer and therefore the work should have been awarded to it, the petitioner filed this writ petition also contending that the extension of time for acceptance of the tender, beyond the outer limit specified in the tender document dated 22.11.2005, is invalid.

In another para in the writ petition the petitioner claims exclusive qualifications to handle the notified work for the respondent-Corporation and asserts its unparalleled credentials for executing the work to the exclusion of any other institution/person. These self-adulatory claims do not merit serious consideration by this court. It is for the respondent-Corporation to consider which bidder is better suited for execution of its works, within the framework of

public law principles governing the grant of contracts of public Corporations.

Only two questions therefore remain to be considered for resolution in this writ petition:

A) Whether the 3rd respondent is disqualified for being considered; and

B) Whether the extension of the period (for keeping the bids open for acceptance) beyond 22.11.2005; the consequent treatment of the 3rd respondent's bid as subsisting beyond 22.11.2005; and the in-principle acceptance of the 3rd respondent's bid, is valid.

The 3rd respondent's qualification is impeached by the petitioner by the singular assertion in the writ petition as set out in para-11. The petitioner asserts *"the third respondent has not fulfilled the conditions for qualifying in the technical bid as per Apendix II (iii)"*. After this assertion the stipulation as to technical expertise set out in Appendix II (iii) is extracted, which merely states the work experience required. The petitioner has not specified in what manner and in what particulars the 3rd respondent is disqualified *qua* the notified experience that is requisite for a qualified bid.

In response to the above vague allegation, in the counter affidavit filed on behalf of the respondent-Corporation by the Assistant General Manager, Regional Office, Hyderabad, it is stated that the 3rd respondent had produced two certificates dated 12.09.2005 and 10.09.2005 from two enterprises to show that he had experience of 3 years preceding the notice inviting tenders dated 30.08.2005 and only after satisfying the technical bid, the price bid was opened. The counter affidavit clearly and unequivocally

denies the petitioner's superficial allegation in para-11 (of the writ petition) that the 3rd respondent does not fulfill the condition of 3 years experience. Mr. G.Vidyasagar learned counsel for the petitioner states that the denial in the counter affidavit is vague.

This court does not find the denial vague in the context of the ambiguous, breezy and superficial allegation in para-11. A stray comment of the petitioner does not merit a monumental denial. Nothing more need be stated on this aspect of the matter. In any event if and when a contract is awarded to the 3rd respondent the petitioner could have assailed the action on the ground that the 3rd respondent was disqualified. The petitioner has however chosen to impeach the 3rd respondent's credentials and has done so without the requisite forensic discipline with pleadings. The petitioner is perhaps now disabled to assail any contract awarded to the 3rd respondent, on application of principles of *res judicata* and constructive *res judicata* in any future proceedings challenging the award of a contract to the 3rd respondent pursuant to the tender notification dated 30.08.2005.

The second substantive attack is that the respondent-Corporation acted illegally and arbitrarily in extending the time for consideration/acceptance of the bids (submitted pursuant to the notification dated 30.08.2005). As already chronicled hereinbefore, on terms the tender stipulated that the bids would be open for acceptance up to 22.10.2005, with a condition empowering the Senior

Regional Manager to extend such date by 30 days. The bids submitted were thus open for acceptance up to 22.11.2005. Within such period, admittedly each of the bidders were requested to convey consent to keep their respective bids open up to 31.12.2005. The petitioner admittedly consented to this request of the respondent-Corporation and has also placed on record a telegram issued by itself keeping its offer open up to 31.12.2005. The 3rd respondent similarly conveyed consent to a similar offer made to him by the respondent-Corporation. By consent the bids of the petitioner and the 3rd respondent were open for acceptance by the respondent-Corporation up to 31.12.2005.

In para-4 of the Corporation's counter affidavit it is pleaded that on 27.12.2005, the 3rd respondent was called for negotiations pursuant to a telegram dated 22.12.2005; that on 27.12.2005 the 3rd respondent agreed to keep his offer open up to 31.01.2006 and that the award of the contract in his favour was finalized on 23.12.2005 itself as the said respondent had agreed to the terms and conditions and the rates quoted in his tender. It is also pleaded that the decision of the 1st respondent (presumably accepting the 3rd respondent's offer) was communicated to the 3rd respondent on 9.1.2006 and the 3rd respondent also agreed to execute the contract work and to abide by the terms and conditions. It is also pleaded that the contract was formerly not awarded to the 3rd respondent on account of the interim direction in this writ petition (dated 21.3.2006, restraining the

respondent-Corporation from awarding the contract to the 3rd respondent).

In para-3 of the counter, the Corporation has set out the bids submitted by 5 parties including the petitioner and the 3rd respondent in a table. According to the table, the 3rd respondent's bid is the lowest, at 64% over the approved schedule of rates (approved by the appropriate Government), whereas the petitioner's bid is the 4th highest at 109% over the approved schedule of rates. Since the 3rd respondent's bid was the lowest, the respondent-Corporation decided to negotiate with him and such negotiation was scheduled on 27.12.2005 within the extended period for acceptance of tenders, extended by mutual consent between the FCI and each of the bidders.

That the 3rd respondent's bid was the lowest and the petitioner's was in no manner comparable in terms of the percentage above the approved schedule of rates, is not in dispute. The petitioner does not contest this assertion made in the counter affidavit. This position *inter se* must therefore be taken as established. It therefore follows that the respondent-Corporation decided to negotiate with the lowest tenderer and to the exclusion of the higher tenderers. There is no principle of administrative law including a principle which governs the award of contracts of public authorities, which denies this rational discretion to a public Corporation. Legal principles are intended to effectuate public interest. *Salus populi est suprema lex*, is the maxim which illustrates the basis of all legal policy. A plurality of concerns fertilize the evolution of legal policy.

They are, *inter alia*, good management and governance practices incorporating checks and balances to regulate nepotistic or arbitrary conduct of State actors and to ensure a competitive rate for the contracts of public Corporations, consistent with affording of equal opportunities of participation to citizens. Legal principles by themselves are not the goals of law. Principles are the means to achieve public weal.

On behalf of the petitioner, no authority is placed before this court which compels an inference that the conduct of the respondent-Corporation in negotiating with the 3rd respondent, who is admittedly the lowest tenderer and to the exclusion of the other higher tenderers, is arbitrary, irrational or contrary to public interest. The conduct of the respondent-Corporation in this area is not hedged in by a spectrum of statutory rules. The conduct is conditioned only by application of general principles of administrative law that operate to regulate the conduct of public authorities to award contracts. No principle, is pleaded, urged or established to have been contravened by the conduct of the respondent-Corporation in negotiating with the 3rd respondent.

Another contention urged by Mr. Vidyasar is that as the tender notification enabled the tenders to be available for acceptance only up to 22.11.2005, extending the life of the bids submitted pursuant to the tender notification dated 30.08.2005 beyond that period, is invalid.

The specification in the tender document that the tenders would remain open for acceptance initially up to

22.10.2005 and thereafter at the discretion of the Senior Regional Manager, Hyderabad for 30 days more, is only a condition which operates on bidders and obligates them not to resile from their bids up to 22.11.2005. This condition is not to be construed as a limit upon the executive discretion of the respondent-Corporation to extend the bids already received. As already stated this is not an area covered by statutory rules and therefore a margin of operational flexibility but consistent with public interest, is permitted. Inflexible interpretation leads to public mischief particularly when it is not governed by statutory rules and is an area left to the spectrum of rational executive discretion. In any event, the petitioner and the 3rd respondent had acceded to and have accorded consent for keeping their respective bids open up to 31.12.2005. The petitioner cannot be heard to renege from the consent consciously given in response to the respondent-Corporation's request in its telegram dated 19.11.2005. Within such extended period (31.12.2005), on 27.12.2005 (as asserted in para-4 of the Corporation's counter) negotiations were held between the Corporation and the 3rd respondent (the lowest bidder) and eventually the 3rd respondent's bid is stated to be under consideration for award of the contract.

All the aforesaid technical pleas appear to be urged by the petitioner solely to perpetuate and impose itself infinitely on respondent-Corporation, on its own terms. The petitioner is not a third party to the tender notification. The petitioner cannot be heard to urge that had it known that the tender would be open beyond 22.11.2005 it would also have

participated in the tender process. The petitioner did offer its bid and the petitioner's bid was also kept open up to 31.12.2005 after its consent to such extension.

For the aforesaid reasons, this court finds no infirmity in the action of the respondent-Corporation in negotiating with and proposing to enter into a contractual relationship with the 3rd respondent. There are no merits in the writ petition, which is accordingly dismissed.

The interim order dated 21.03.2006 stands dissolved.

There shall be no order as to costs.

Dt: 21.09.2006 --------

Pvsn
Justice G.Raghuram